Hudson Neckwear, Inc. *and* National Organization of Industrial Trade Unions. Cases 2–CA–23709 and 2–CA–23856

March 19, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND RAUDABAUGH

On November 13, 1990, Administrative Law Judge D. Barry Morris issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a letter as a reply, in lieu of an answering brief, along with a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Hudson Neckwear, Inc., New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In agreeing that the Respondent violated Sec. 8(a)(1) by interrogating Darmalingum Member Cracraft does not rely on *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).

Burt Pearlstone Esq., for the General Counsel.
Steven B. Horowitz, Esq. (Horowitz & Pollack), of South Orange, New Jersey, for the Respondent.
Mr. Sam Kerr, of New York, New York, for the Charging Party.
David M. Prouty, Esq., of New York, New York, for the Intervenor.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me in New York City on March 21, 1990. On charges filed on June 29 and September 22, 1989,[1] a consolidated complaint was issued on January 22, 1990, alleging that Hudson Neckwear, Inc. (Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). Respondent filed an answer denying the commission of the alleged unfair labor practices.

The parties were given full oportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were filed by the General Counsel and by the Respondent.

On the entire record of the case, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York corporation with an office and place of business in New York City, has been engaged in the manufacture of neckwear. It annually sells and ships from its New York facility goods valued in excess of $50,000 to consumers located outside the State of New York. Respondent admits, and I so find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, it has been admitted, and I find that National Organization of Industrial Trade Unions (NOITU or the Union) and New York Joint Board of Neckwear Workers, Amalgamated Clothing & Textile Workers Union, AFL–CIO, CLC (ACTWU) are labor organizations within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

The issues are:

(1) Did Respondent interrogate employees, create the impression of surveillance and imply that employees could not select a collective-bargaining representative of their own choice, in violation of Section 8(a)(1) of the Act?

(2) Did Respondent discharge employees because of their union activities in violation of Section 8(a)(1) and (3) of the Act?

(3) Did Respondent make a valid offer of reinstatement to Yvonne Agostini?

B. *The Facts*

1. Background

On May 15 or 16, 1989, representatives of NOITU began visiting Respondent's facility on a daily basis and handed out union authorization cards to Respondent's employees. On May 18 ACTWU filed a representation petition to represent Respondent's production and maintenance employees. On June 8 NOITU sent a mailgram to Respondent demanding recognition as the exclusive collective-bargaining agent for the production employees. Respondent stipulated at the hearing that the alleged discriminatees were not laid off for economic reasons.

2. Darmalingum

Appamah Darmalingum began her employment with Respondent in March 1982. She was employed as one of several packers, putting hooks and prices on the neckties and placing them in boxes for the shipper to send out. At the time of her discharge on June 28, she was the most senior of five employees in the packing department. She testified that she had never been disciplined in any manner, or warned

[1] All dates refer to 1989 unless otherwise specified.

for poor work performance or for any other reason, in the 7 years she was employed by Respondent.

Darmalingum signed a union authorization card on June 19. On June 28 one of Respondent's owners, Irving Berger, came to Darmalingum's worktable and asked her to come to his office. Darmalingum credibly testified that after she went to Berger's office he asked her if she had signed a union card. Darmalingum responded that she had. Berger then said, ''Here is your vacation pay, you could stay home.'' Darmalingum asked him why and Berger responded, ''Because you have signed the Union card.'' Darmalingum testified that Respondent normally closes down each year for the first 2 weeks of July. She testified that after the vacation she called Berger to ask if there was work and he replied that there was none. She was reinstated during the first week of August.

3. Agostini

Yvonne Agostini began her employment with Respondent on February 19. She credibly testified that at around 5:15 p.m. on June 28, as she was walking towards the elevator to leave for the day, Respondent's president, Leo Lieber, approached her and said, ''Yvonne, I heard that you joined the union.'' Agostini replied, ''What union?'' and told Lieber that she had never heard from the Union, paid dues, or attended any meetings. Lieber told her not to come to work the next day. When she asked him why, he simply replied, ''Do not come back.'' Sam Kerr, the executive vice president of NOITU, credibly testified that he had a conversation with Agostini during August and told her that he had spoken to Respondent's attorney who had advised him that Agostini could return to work. William Berger testified that a letter of reinstatement was sent to Agostini on September 5. However, Agostini testified that she never received the letter.

4. Gonzalez

Sara Gonzalez began her employment with Respondent in 1974. Her job was to sew the labels on the neckties. Kerr handed her a union authorization card on June 19 and she returned the signed card to Kerr the next morning. Gonzalez credibly testified that at around 3 p.m. on June 28 Irving Berger called her to his office. Berger told her that he knew that she had signed a union card. Berger further said that ''we are going to have a union over here too, another union.'' Gonzalez told Berger that she signed the card because she was told that she would get medical and dental benefits. Berger then said to Gonzalez, ''You are no longer going to work here.'' Kerr credibly testified that at around 3 p.m. on June 28 he saw Gonzalez leaving the building, crying. She told Kerr that he had promised that nobody would know that she signed the authorization card. She said that the ''boss'' knew that she had signed the card and that she had been fired for signing the card.

C. *Discussion and Conclusions*

1. Discharge of Darmalingum

Darmalingum appeared to me to be a credible witness. I credit her testimony that on June 28 Irving Berger asked her if she signed a union authorization card. When she replied that she did, he told her, ''Here is your vacation pay, you could stay home.'' When she asked him the reason, he said, ''Because you have signed the union card.''

Under *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board requires that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. Once this is established, the burden shifts to the employer to demonstrate that the ''same action would have taken place even in the absence of the protected conduct.'' I have credited Darmalingum's testimony that Irving Berger told her that she was discharged because she signed a union authorization card. Accordingly, the General Counsel has established a prima facie showing that protected conduct was a motivating factor in the Employer's decision to discharge Darmalingum.

Respondent contends, however, that Darmalingum was laid off because her work became unsatisfactory. Thus, William Berger testified that the work in Darmalingum's department had slowed down and that whereas she had once been the ''best'' employee she now became the ''worst.'' While Darmalingum testified that there were times when the employees were urged to ''hurry up'' because a shipment had to be made, she also testified that on the day she was discharged no mention was made of her allegedly poor performance. Although William Berger testified that he overheard a conversation in which Irving Berger told Darmalingum that her work had deteriorated and that ''we decided to lay her off,''I credit Darmalingum's testimony in this regard. William Berger appeared evasive on cross-examination. While William Berger testified that Darmalingum's productivity slowed down around the third week of May, it was not until after Darmalingum signed the union authorization card that she was discharged. Other than William Berger's testimony, Respondent introduced no evidence to indicate that Darmalingum's work performance deteriorated.

I find that Darmalingum was discharged for having signed a union authorization card. I further find that at the time of her discharge she was not told that the reason for her discharge was unsatisfactory performance. I conclude that Respondent has not satisfied its burden of showing that the discharge would have taken place ''even in the absence of the protected conduct.''

2. Discharge of Agostini

I have credited Agostini's testimony that on June 28 Lieber told her ''I heard that you joined the union.'' He then told her, ''Do not come back to work tomorrow.'' I find that the General Counsel has made a prima facie showing that Agostini's having signed an authorization card was a motivating factor in her discharge. William Berger testified that Agostini was involved in various shouting incidents beginning in May and that in the beginning of June she said to him that ''she hates to work here.'' He further testified that on June 28 he overheard Lieber telling Agostini that she has ''too many problems in the shop and the best thing would be if she wouldn't come in.'' Agostini denied that she was told that she was being laid off because she did not get along with the other employees. When questioned whether he heard the entire conversation between Agostini and Lieber on June 28, William Berger testified that he was standing at a distance and he heard ''approximately'' what was said. William

Berger conceded that Respondent waited over 2-1/2 weeks to discharge Agostini after the most recent alleged shouting incident. I find that Respondent discharged Agostini because she signed a union authorization card. I further find that at the time of her discharge she was not told that the reason for her discharge was the alleged problems she was having in the plant. I conclude that Respondent has not satisfied its burden of showing that the discharge would have taken place even in the absence of the protected conduct.

3. Discharge of Gonzalez

Gonzalez appeared to me to be a credible witness. I credit her testimony that on June 28 Irving Berger told her that he knew that she signed a union authorization card and he then told her, ''You are no longer going to work here.'' I find that the General Counsel has made a prima facie showing that Gonzalez' signing of the union authorization card was a motivating factor in her discharge.

William Berger testified that he received complaints beginning in May that labels which Gonzalez sewed on the ties were coming off. He also testified that Irving Berger used identical language in laying off Gonzalez as he did in laying off Darmalingum, that since her work deteriorated they decided to lay her off. Gonzalez credibly testified that no reason was given her for her discharge other than her having signed a union authorization card. As noted earlier, William Berger appeared to be evasive on cross-examination. Although he claimed to be knowledgeable as to all aspects of matters concerning Respondent's employees, he testified that he was not aware of the Board letter dated May 18 or the ACTWU petition dated the same date. This strikes me as highly unlikely, especially given the testimony that William Berger regularly reviews Respondent's incoming mail and has regular conferences with Lieber concerning the ''shop'' and the ''business.''

Gonzalez had been an employee of Respondent for approximately 18 years. Until May her job performance was by William Berger's own admission, ''very good.'' In addition, Gonzalez credibly testified that further instances of labels falling off ties have occurred since she was reinstated by Respondent in September, and that she was not warned or disciplined on those occasions. I find that Respondent has not sustained its burden of showing that the discharge would have taken place in the absence of the protected conduct.

4. Alleged violations of Section 8(a)(1)

The complaint alleges that on June 28 Respondent interrogated its employees concerning their union activities. I have found that on June 28 Irving Berger asked Darmalingum if she had signed a union authorization card. In *Rossmore House*, 269 NLRB 1166 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 706 F.2d 1006 (9th Cir. 1985), the Board requires that all the circumstances involved in an interrogation be examined to determine whether the interrogation tended to restrain, coerce, or interfere with rights guaranteed by the Act. Among the factors examined are the background of the interrogation, the nature of the information sought, the identity of the questioner and the place and method of interrogation. *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1218 (1985). In *Raytheon Co.*, 279 NLRB 245, 246 (1986), the Board considered such factors as where the questioning took place, whether the questioning was by an immediate supervisor who worked closely with the employee, whether it was made in a joking tone and whether the employee was an open, active union supporter.

Darmalingum was not an open and active union supporter. The interrogation was by Irving Berger who was one of the owners of Respondent, took place in Berger's office and was not done in a joking tone. I find, after considering all the circumstances, that the interrogation reasonably tended to restrain, coerce, or interfere with Darmalingum's Section 7 rights, in violation of Section 8(a)(1) of the Act.

The complaint also alleges that Respondent created the impression among its employees that their union activities were under surveillance. On June 28 when Leo Lieber interrogated Agostini he stated, ''I heard that you joined the union.'' Similarly, on the same day, when Irving Berger interrogated Gonzalez he stated that he ''knew'' that she had signed a union authorization card.

The Act not only prohibits actual acts of surveillance but also conduct by an employer which creates the ''impression of surveillance.'' *Inner City Broadcasting Corp.*, 281 NLRB 1210, 1223 (1986); *Overnite Transportation Co.*, 254 NLRB 132, 133 (1981). I find that Lieber's statement that he had ''heard'' that Agostini had signed a union authorization card and Irving Berger's statement that he ''knew'' that Gonzalez had signed an authorization card constitute conduct which creates the impression of surveillance, in violation of Section 8(a)(1). See *Link Mfg. Co.*, 281 NLRB 294 (1986).

In addition, the complaint alleges that on June 28 Respondent advised its employees that they could not select a collective-bargaining representative of their own choice, in violation of Section 8(a)(1) of the Act. I have found that on June 28, during Irving Berger's questioning of Gonzalez, he told her that Respondent would pay ''more than the union'' would and that ''we are going to have . . . another union'' here. I believe that such a statement implies that the Respondent would choose the union to represent the employees and that the employees would not have a choice in the matter. I find that such a statement violates Section 8(a)(1) of the Act. See *Multimatic Products*, 288 NLRB 1279, 1310 (1988).

5. Offer of reinstatement of Agostini

The record contains a letter addressed to Agostini, dated September 5, notifying her that Respondent is ''calling you back to work as of today.'' William Berger testified that he heard Irving Berger dictate the letter and that the office staff was instructed to mail it. Agostini testified that she never received the letter. However, I find that she was aware that Respondent was offering her reinstatement because Kerr had already told her that.

For an offer of reinstatement to be effective the employer must make it in good faith and in a manner in which it could be reasonably anticipated that the employee would receive notice of the offer. See *Knickerbocker Plastic Co.*, 132 NLRB 1029, 1236 (1961); *Salem Paint, Inc.*, 257 NLRB 336, 341 (1981). The offer may be effective even though not received by the employee. *Rollash Corp.*, 133 NLRB 464, 465–466 (1961); *Salem Paint, Inc.*, supra, 257 NLRB at 341.

I credit William Berger's testimony that the offer of reinstatement was mailed to Agostini. While Agostini denied having received the letter, she had been told by Kerr that he

had been advised by Respondent's attorney that she could go back to work. I conclude that Respondent acted in good faith in attempting to apprise Agostini of the offer. Accordingly, I find that the letter dated September 5 constitutes a valid offer of reinstatement to Agostini.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. National Organization of Industrial Trade Unions and New York Joint Board of Neckwear Workers, Amalgamated Clothing & Textile Workers Union, AFL–CIO, CLC are labor organizations within the meaning of Section 2(5) of the Act.

3. By interrogating employees concerning their union activities, by creating an impression among employees that their union activities were under surveillance and by advising their employees that they could not select a collective-bargaining representative of their own choice, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By discharging Appamah Darmalingum, Yvonne Agostini, and Sara Gonzalez because they signed union authorization cards, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

5. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent having discharged Appamah Darmalingum, Yvonne Agostini, and Sara Gonzalez in violation of the Act, I find it necessary to order Respondent to make them whole for any loss of earnings that they may have suffered from the time of their discharges to the dates of Respondent's offers of reinstatement. Backpay shall be computed in accordance with the formula approved in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[2]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Hudson Neckwear, Inc., New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees concerning their union activities; creating an impression among employees that their union activities are under surveillance and advising employees that they cannot select a collective-bargaining representative of their own choice.

(b) Discharging employees for activities protected by Section 7 of the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole Appamah Darmalingum, Yvonne Agostini, and Sara Gonzalez for any loss of earnings, with interest in the manner set forth in the remedy section of this decision.

(b) Remove from its files any references to the unlawful discharges of Darmalingum, Agostini, and Gonzalez and notify them in writing that this has been done and that the discharges will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in New York, New York, copies of the attached notice marked ''Appendix.''[4] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[2] Under *New Horizons*, interest is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6612.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT interrogate employees concerning their union activities, create an impression among employees that their union activities are under surveillance and advise employees that they cannot select a collective-bargaining representative of their own choice.

WE WILL NOT discharge employees for activities protected by Section 7 of the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 of the National Labor Relations Act.

WE WILL make whole Appamah Darmalingum, Yvonne Agostini, and Sara Gonzalez for any loss of earnings that they may have suffered by reason of their discharges, with interest.

WE WILL remove from our files any references to the unlawful discharges of Darmalingum, Agostini, and Gonzalez and notify them in writing that this has been done and that the discharges will not be used against them in any way.

HUDSON NECKWEAR, INC.